

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE	)	
AUTHORIZATION TO CHANGE	)	
APPROPRIATION WATER	)	FINAL ORDER
RIGHT G(W)110835-76N BY	)	
JOE AND MURIEL HOLLAND	)	

\* \* \* \* \*

The Hearing Examiner issued her Proposal for Decision (Proposal) on June 12, 1997. The Hearing Examiner reviewed the information submitted by the Hollands' and Wallace Longpre for the 1996 irrigation season and found that the evidence does not establish whether water the Hollands were pumping from Lansing Slough was water they diverted into the slough from Lynch Creek. The Hearing Examiner found nothing that would convince the Department that its initial determination that a measuring device is required was in error.

The evidence reviewed by the Hearing Examiner was submitted in response to a Show Cause Order issued by the Department. In the order the Department found, based on the information already in the file for the change authorization, that other water users along Lansing Slough were being adversely affected because the Hollands were using water and making calls on water that they could not prove was theirs to use or call. The Department determined that a flow measuring device was necessary on the diversion from Lynch Creek to Lansing Slough so that the Hollands

can document that they divert as much water into the slough as they pump from the slough.

The hearing was held to give the Hollands an opportunity to establish that other water users on Lansing Slough were not adversely affected and that a measuring device was not necessary. At the hearing it was agreed that the process would be stayed for a year to enable the Hollands to submit measurements of water diverted and water use to establish that other water users are not adversely affected. The information was submitted and the Hearing Examiner issued her findings and conclusions on that information.

The Hollands and their attorney, Richard Gebhardt, were noticed that they had 30 days to file exceptions to the Proposal for Decision and to request oral argument. No request for oral argument was received and no exceptions were filed with the Department. However, the Hearing Examiner received a letter from the Hollands' attorney on July 9, 1997. The Department will treat that letter as written exceptions to the Proposal for Decision.

The first exception is a procedural complaint that the Hollands had not submitted any evidence and that the Hearing Examiner had accepted evidence from the Department outside of the hearing process. With respect to the Holland's submission of evidence, the Hollands had every opportunity to submit their evidence prior to and at the show cause hearing held on Friday, May 10, 1996, and during the year long stay period after the

hearing. Moreover, it is incorrect that the Hollands have never presented any evidence in this matter. The Hollands submitted their records of water use during the summer of 1996 and that evidence is the primary basis for the Proposal for Decision. The Hollands also submitted information concerning possible water measuring devices and the circumstances of their water right prior to the show cause hearing. All of the information and correspondence between the Department and the Hollands concerning the change authorization and the dispute over necessary measurements is in the record and has been fully considered by the Department.

The exceptions also complain that the Hearing Examiner accepted evidence from the Department outside the hearing process and that the Department's attorney had ex parte contact with the Hearing Examiner. The complaint misunderstands the nature of the show cause hearing and the Department's role in the change authorization process. The Department is the decision-maker. There were no ex parte contacts because the Department is not a party. The Department used its personnel to evaluate the evidence and consulted with its attorney on matters of law.

The Hollands were kept fully informed of the Department's intended actions and the information upon which those actions were based. The Hollands were provided with every opportunity to challenge the information and submit their own information. The process was fair.

The exceptions also request that the Department amend the measuring device condition to appoint Mr. Holland as "water master of the ditch." To the extent Mr. Holland is requesting the Department to require that Mr. Holland have control over the diversion works, the Department must deny the request. Control over the diversion works must be worked out between the water users and the owner or owners of the diversion works.<sup>1</sup> The Department lacks authority to appoint water masters or commissioners. See Mont. Code Ann. § 85-5-101 (1995).

Although oral argument was not requested, the exceptions request that if the Department cannot appoint Mr. Holland as water master the hearing be reconvened for development of additional evidence. The request for rehearing is denied. The Hollands had sufficient opportunity to present their evidence. Moreover, Department rules expressly prohibit rehearing. ARM 36.12.231.

Having fully considered the Hollands' exceptions, the Department adopts the Findings of Fact and Conclusions of Law in the Show Cause Order and the Proposal for Decision for this Final Order.

#### ORDER

Authorization to Change Water Right G(W)110835-76N is modified to include the following conditions:

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<sup>1</sup>The Hollands might look to MCA, § 85-5-110, 1995, as a possible method toward solving the water use controversies on Lansing Slough.

PUMPING FROM LANSING SLOUGH LIMITED BY DIVERSION FROM LYNCH CREEK:

Change authorization G(W)110835 is subject to the condition that the appropriator shall pump no more water from Lansing Slough than is simultaneously diverted into the slough from Lynch Creek. Because this change authorization is for 250 gallons per minute, neither the Lynch Creek diversion nor pumping from Lansing Slough may exceed 250 gallons per minute.

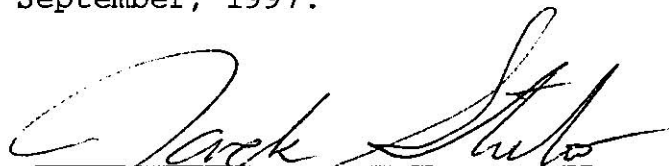
MEASURING DEVICE REQUIRED:

Change authorization G(W)110835 is subject to the condition that the appropriator shall install adequate flow metering devices to allow the flow rate and volume of water diverted under this authorization from Lynch Creek into Lansing Slough, and the water diverted from Lansing Slough to be measured. The appropriator shall keep a written record of the flow rate and volume of all waters diverted from Lynch Creek into Lansing Slough, and all water diverted from Lansing Slough. The written records shall also include the period of time the waters are diverted. The records shall be submitted by November 30th of each year or upon the request of DNRC to the Water Resources Regional Office at P.O. Box 860, Kalispell, MT 59901.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 5<sup>th</sup> day of September, 1997.



Jack Stults, Administrator  
Department of Natural Resources  
and Conservation  
Water Resources Division  
P.O. Box 201601  
Helena, Montana 59620-1601  
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, first class mail, at their address or addresses this 9th day of September, 1997, as follows:

Joe and Muriel Holland  
Lower Lynch Creek Rd  
Plains, MT 59859

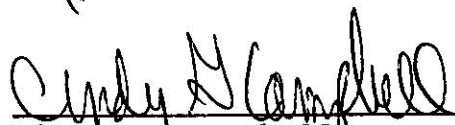
M. Richard Gebhardt  
6296 Kruse Ln  
Ronan, MT 59864

Wallace Longpre  
P.O. Box 1051  
Plains, MT 59859

Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural  
Resources & Conservation  
P.O. Box 201601  
Helena, MT 59620-1601

Fred Robinson  
Legal Counsel  
Department of Natural  
Resources & Conservation  
P.O. Box 201601  
Helena, MT 59620-1601

Charles Brasen, Mgr  
Kalispell Water Resources  
Regional Office  
P.O. Box 860  
Kalispell, MT 59903-0860  
(via electronic mail)

  
Cindy G. Campbell  
Hearings Assistant

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

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IN THE MATTER OF THE	)	
AUTHORIZATION FOR CHANGE OF	)	PROPOSAL
APPROPRIATION WATER RIGHT	)	FOR
G(W)110835-76N BY JOE AND	)	DECISION
MURIEL HOLLAND	)	

\* \* \* \* \*

A show cause hearing pursuant to Mont. Code Ann. § 85-2-402(10) (1995) was conducted by the Department of Natural Resources and Conservation (Department) on Friday, May 10, 1996, at 1:00 p.m. in the Council Room of City Hall in Plains, Montana. Joe and Muriel Holland were represented at the hearing by attorney Richard Gebhardt. The hearing was conducted to allow the Hollands to show cause why the Authorization to Change Water Right G(W)110835-76N should not be conditioned as follows:

PUMPING FROM SLOUGH LIMITED BY DIVERSION FROM LYNCH CREEK

Change Authorization G(W)110835-76N is subject to the condition that the appropriator shall pump no more water from Lansing Slough than is simultaneously diverted into the slough from Lynch Creek. Because this change authorization is for 250 gallons per minute up to 100 acre-feet, neither the Lynch Creek diversion nor pumping from Lansing Slough may exceed 250 gallons per minute.

MEASURING DEVICE REQUIRED

Change Authorization G(W)110835-76N is subject to the condition that the appropriator shall install adequate flow metering devices to allow the flow rate and volume of water

diverted under this authorization from Lynch Creek into Lansing Slough, and the water diverted from Lansing Slough to be measured. The appropriator shall keep a written record of the flow rate and volume of all waters diverted from Lynch Creek into Lansing Slough, and all water diverted from Lansing Slough. The written records shall also include the period of time the waters are diverted. The records shall be submitted by November 30 of each year or upon the request of DNRC to the Water Resources Regional Office at PO Box 860, Kalispell, MT 59901.

The parties and this Hearing Examiner agreed to stay the proceedings for one year. It was further agreed the Hollands would measure their water use and measure water diverted into the slough to establish that other water users are not adversely affected. Finally, it was agreed that if after one year, it still appeared to the Department that other water users along Lansing Slough are being adversely affected then the process to modify or revoke the change authorization would resume.

The Hollands submitted their record of water use during the 1996 irrigation season to the Department on September 26, 1996. The Hollands counted the number of heads in use per day and provided that they were using 5/32 heads delivering five gallons per minute per head. Another water user along Lansing Slough, Mr. Wallace Longpre, also submitted information concerning the Hollands' use of Lansing Slough water during the 1996 irrigation season. This information included Mr. Longpre's count of heads



the Hollands were using on various days. Although there were differences between the counts during portions of the monitoring season, the differences are small and the number of heads reported by Mr. Longpre never exceeded the highest count of 48 reported by the Hollands. Based on this information, the Kalispell Regional Office Manager estimated a maximum pumping rate of 240 gallons per minute<sup>1</sup> and 70 acre-feet were used during the irrigation season.

Regarding the amount of Lynch Creek water diverted into Lansing Slough, the only information provided was "headgate turned 6 turns" on June 21, 1996. Wallace Longpre observed on several days in mid-July that he did not believe 250 gallons per minute were being diverted into Lansing Slough but without a measuring device, there is no way to confirm the observation. This information is insufficient for the Department to estimate flow rate and volume of water diverted into Lansing Slough from Lynch Creek.

Therefore, based upon the evidence submitted, the Department makes the following:

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<sup>1</sup>This estimate was made based on five gallons per minute from each head provided by Mr. Holland. Five gallons per minute would be the output from 5/32 heads at a system pressure of 50 psi. A system pressure of 70 psi in these nozzles would push approximately 288 gallons per minute through the heads.

### FINDINGS OF FACT

1. The Hollands' water use did not exceed the 250 gallons per minute or the 100 acre-feet volume authorized by the change.

2. The information submitted does not establish whether the water Hollands are pumping from Lansing Slough is water they diverted into Lansing Slough from Lynch Creek.

3. The information does not establish that other water users along Lansing Slough will not be adversely affected by the Hollands' change as presently exercised. Apparently, there were no conflicts during the summer of 1996, but during times of water shortage it will not be possible to administer water in Lansing Slough according to priorities or to determine whether Hollands are diverting the same amount of water from Lynch Creek to Lansing Slough as they are taking from Lansing Slough.

Based upon the foregoing Findings of Fact and the information submitted, the Department makes the following:

### CONCLUSION OF LAW

1. The conditions as proposed must be implemented to avoid adverse effect to other water users caused by Authorization to Change Appropriation Water Right G(W)110835-76N. As the change is now exercised, no one knows whether the Hollands are pumping water from Lansing Slough that is theirs to use. During times of

water shortage, this circumstance will cause problems for all water users along Lansing Slough.

Therefore, the Department makes the following:

#### ORDER

Authorization to Change Water Right G(W)110835-76N is modified as proposed.

#### PUMPING FROM SLOUGH LIMITED BY DIVERSION FROM LYNCH CREEK

Change Authorization G(W)110835-76N is subject to the condition that the appropriator shall pump no more water from Lansing Slough than is simultaneously diverted into the slough from Lynch Creek. Because this change authorization is for 250 gallons per minute up to 100 acre-feet, neither the Lynch Creek diversion nor pumping from Lansing Slough may exceed 250 gallons per minute.

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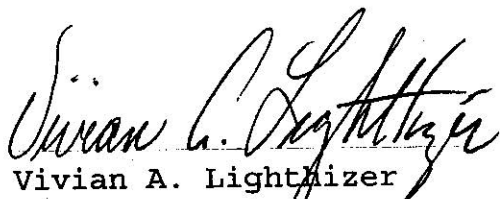
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#### NOTICE

The appropriator has 30 days to file exceptions to the above terms and conditions and request an oral argument. If an oral

argument is not requested, the authorization to change appropriation water right will be conditioned as proposed.

Dated this 12<sup>th</sup> day of June, 1997.



Vivian A. Lighthizer  
Hearing Examiner  
Water Resources Division  
Department of Natural Resources  
and Conservation  
P.O. Box 201601  
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 12<sup>th</sup> day of June, 1997, as follows:


Joe and Muriel Holland  
Lower Lynch Creek Rd.  
Plains, MT 59859

Wallace Longpre  
P.O. Box 1051  
Plains, MT 59859

Fred Robinson  
Legal Counsel  
Department of Natural  
Resources and Conservation  
P.O. Box 201601  
Helena, MT 59620-1601

M. Richard Gebhardt  
6296 Kruse Ln.  
Ronan, MT 59864

Charles Brasen, Manager  
Kalispell Water Resources  
Regional Office  
P.O. Box 860  
Kalispell, MT 59903-0860

  
Cindy G. Campbell  
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**CASE # 110835**

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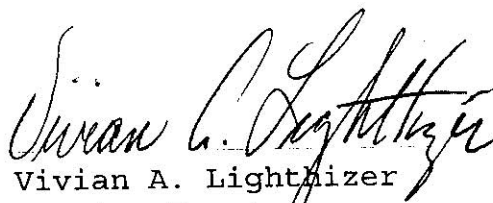
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Dated this 12<sup>th</sup> day of June, 1997.



Vivian A. Lighthizer  
Hearing Examiner  
Water Resources Division  
Department of Natural Resources  
and Conservation  
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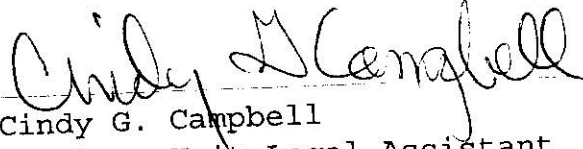
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